(2)

No. 87-1545

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1987

PAUL E. CLEU,
*Petitioner,*

VS.

O'CONNOR HOSPITAL, et al.,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GREGORY W. MCCLUNE
STEPHEN W. PARRISH*
WEISSBURG AND ARONSON, INC.
555 California Street
Suite 2400
San Francisco, CA 94104
(415) 434-4484
*Counsel for Respondent*
*O'Connor Hospital*

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

27pp

## QUESTION PRESENTED

Does the Free Exercise Clause guarantee the right of religious organizations to select, employ and remove persons serving in religious, ecclesiastical roles, free from civil law interference?

## PARTIES TO THE PROCEEDINGS BELOW

The appropriate designation of the parties is not accurately set forth in the petition. Petitioner incorrectly refers to respondent O'Connor Hospital as "O'Connor Hospital, Inc." This is an incorrect appellation which has not previously been used in the proceedings below.[1]

---

[1] O'Connor Hospital is a California not-for-profit public benefit corporation. Its sole corporate member is O'Connor Health Services Corporation, a California not-for-profit public benefit corporation, whose sole corporate member, in turn, is Daughters of Charity National Health System-West Region, a California not-for-profit public benefit corporation. The other party to the proceeding in the Court of Appeal of the State of California, Sixth Appellate District, is the Superior Court of the State of California in and for the County of Santa Clara.

## TABLE OF CONTENTS

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

## TABLE OF AUTHORITIES

### CASES

## TABLE OF AUTHORITIES

### CASES



### Constitutional and Statutory Provisions



### Miscellaneous

No. 87-1545

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1987

PAUL E. CLEU,
*Petitioner,*

VS.

O'CONNOR HOSPITAL, et al.,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent O'Connor Hospital respectfully prays that petitioner Paul E. Cleu's petition for writ of certiorari to review a decision of the Court of Appeal of the State of California, Sixth Appellate District, entered on October 14, 1987, be denied.

## OPINION BELOW

The opinions and decisions in the courts below are accurately set forth in the Appendix to the Petition for Writ of Certiorari, at pages 1a through 19a, except as follows. The order of the Supreme Court of the State of California, denying petitioner's request for review, was amended by order of that court made on December 30, 1987, and is set forth in the Appendix to this Brief, at pages A-1 and A-2. The Peremptory Writ of Prohibition, directed to the Superior Court of California in and for the County of Santa Clara, is omitted from the Petition for Writ of Certiorari, and is therefore set forth in the Appendix to this Brief, at page A-3.

## JURISDICTION

The opinion of the Court of Appeal of the State of California, Sixth Appellate District, which Petitioner seeks to have reviewed, was entered October 14, 1987. A hearing in the California Supreme Court was denied on December 23, 1987. The Peremptory Writ of Prohibition was issued by the Court of Appeal on January 7, 1988.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28, United States Code. An opinion of this Court which supports jurisdiction is *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931).

## CONSTITUTIONAL PROVISIONS INVOLVED

*Amendment 1*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

Respondent O'Connor Hospital ("Hospital") is an acute care hospital located in San Jose, California, sponsored and operated by the Daughters of Charity of St. Vincent de Paul ("Daughters of Charity" or "Daughters"), a religious order of the Catholic Church. The Daughters' religious mission is expressed specifically in the sponsoring and operating of hospitals, and encompasses not only caring for the physical needs of the sick, but also tending to the *spiritual* needs of the Hospital community consisting of patients, their families and those important to them, and the Hospital's staff.

Tending to the spiritual needs of the Hospital community is the responsibility of the Pastoral Care department, which is headed by the Hospital's Catholic Chaplain. The Catholic Chaplain, who is required to be an ordained Catholic priest, supervises a staff

which, with the exception of a secretary, consists entirely of Catholic religious. One of the positions under the Catholic Chaplain's supervision is the Associate Chaplain.

The Associate Chaplain also is required to be an ordained Catholic priest. His duties include serving the spiritual well-being of the Hospital community, serving in an advisory capacity to the Hospital administration and staff on matters of Canon Law and Church moral and ethical standards, and, as part of the pastoral care team, helping to convey the Christian spirit of the Hospital, as set forth in the Daughters' philosophy. The duties of the Associate Chaplain also include the celebration of daily Masses, and administering the sacraments (Eucharist, Baptism, Penance, Anointing of the Sick).

In March, 1983, Father Paul E. Cleu (petitioner), a diocesan priest incardinated in the Catholic Diocese of Oakland, was hired to serve as an Associate Chaplain in Pastoral Care, under the authority of the Catholic Chaplain. Petitioner continued to serve as Associate Chaplain until he was discharged, in October 1985. Almost from the beginning of petitioner's brief tenure at the Hospital, there were problems with his performance. These centered on what was perceived by other religious to be his rigid, uncompromising approach to pastoral care, his confrontational manner of dealing with the Sisters in pastoral care, and his difficulty in working as a member of the pastoral care team. These problems resulted in several incidents where petitioner refused or failed to attend to the needs of patients or their families, and in open conflict between himself and the Sisters. As a result, by August 1985, the Hospital administration was seriously concerned about the functioning of pastoral care at the Hospital.

On August 15, 1985, petitioner was invited to begin looking for a position at another facility. Petitioner's last day of work was on October 31, 1985, although to assist him in his transition, the Hospital continued his salary and benefits for another eight months, through July, 1986, and provided him with "out-placement" consultation services at Hospital expense.

On August 14, 1986, after the salary continuation ceased, petitioner filed suit against the Hospital in the Santa Clara

County Superior Court, seeking damages for his alleged wrongful termination of employment. The Hospital answered the Complaint, raising as a defense that the rights and remedies alleged by petitioner were violative of the provisions of the Free Exercise Clause of the First Amendment.

The Hospital filed a motion for summary judgment directed to the jurisdictional issue raised by the Hospital's Free Exercise Clause defense. On June 11, 1987, the trial court made its order denying summary judgment, but granting summary adjudication in favor of the Hospital as to the following two issues: (1) O'Connor Hospital [respondent] is an institution sponsored and operated by the Daughters of Charity of St. Vincent de Paul, a religious order of the Roman Catholic Church; and, (2) Father Cleu [petitioner] was fulfilling a religious, ecclesiastical role in serving as an Associate Chaplain at O'Connor Hospital.

On June 17, 1987, the Hospital filed a Petition for Writ of Prohibition with the Court of Appeal of the State of California, Sixth Appellate District. On October 14, 1987, the Court of Appeal filed its written decision directing that a Writ of Prohibition issue, preventing any other proceedings other than dismissal of the action.

On November 19, 1987, petitioner filed a Petition for Review with the Supreme Court of California, which was denied on December 23, 1987. Thereafter, on January 7, 1988, the Court of Appeal issued its Peremptory Writ of Prohibition commanding that the action be dismissed (Appendix, p. A-3). On February 9, 1988, pursuant to the Writ, the trial court entered its Order of Dismissal. This proceeding follows.

## REASONS FOR DENYING THE WRIT

### I

### THE PETITION SHOULD BE DENIED AS THE DECISION OF THE COURT OF APPEAL IS CONSISTENT WITH THE GREAT WEIGHT OF JUDICIAL AUTHORITY

Petitioner argues that the Court of Appeal should have permitted the trial court to apply "neutral principles" to his employment

dispute to determine whether respondent Hospital had "religious" reasons for terminating his employment. Presumably, he would argue that, if the reasons were other than "religious," petitioner would be able to sue his employer for damages for breach of contract under state law theories. He further argues that the Court of Appeal's deference to the religious employer's decision conflicted with judicial authorities.

Contrary to petitioner's assertions, the Court of Appeal decision is completely consistent with the great weight of federal and state authority.

### A. The First Amendment Requires That Courts Defer To Religious Authorities In Ecclesiastical Disputes

This Court has articulated a rule of deference to Church authority in "religious disputes," reasoning that civil courts are not competent in ecclesiastical law and the religious faith of churches, and that churches must be permitted autonomy in religious matters in order to preserve religious freedom. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727-29, 20 L.Ed. 666 (1872). This Court also emphasized in *Watson* that Church members have impliedly given consent to be governed by the Church in ecclesiastical matters. Ibid.

The rule of deference was followed in subsequent decisions of this Court regardless of the nature of the dispute. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929); *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). However, this Court noted that at least with respect to church *property* disputes, there might be circumstances where it could exercise jurisdiction in the absence of ecclesiastical or doctrinal issues. *Presbyterian Church v. Hull Church*, 393 U.S. at 449. Thus, the stage was set for the first qualification of the general rule of deference announced in *Jones v. Wolf*, 443 U.S. 595 (1979), in which this Court articulated a "neutral principles of law doctrine" permitting limited court review of church *property* disputes. Nonetheless, there has been no erosion from the strict rule of deference as applied to ecclesiastical disputes, and this Court has forcefully

upheld this principle in such cases. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714-15 (1976) (hereinafter "*Serbian Orthodox Diocese*").

There is no dispute that respondent Hospital is an institution sponsored and operated by a religious order of the Catholic Church, is an integral part of that Order's religious mission, and is, therefore, a religious organization to which the rule of deference must be extended. Indeed, the trial court specifically found the Hospital to be a "religious organization", and petitioner no longer disputes this essential fact in his petition.[2] This finding also finds support in a recent decision of this Court. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S.Ct. 2862 (1987) (hereinafter "*Presiding Bishop*"). *And see,* Laycock, *Towards a General Theory of the Religious Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 Colum.L.Rev. 1373, 1389, 1408-09 (1981), cited with approval by this Court in *Presiding Bishop v. Amos*, 107 S.Ct. at 2871.

Thus, since the religious status of the Hospital is not in dispute, the next stage of the inquiry must be whether the decision to remove petitioner from his position as Associate Chaplain was an ecclesiastical matter.

**B. Any Dispute Between A Religious Organization And A Minister, Involving The Latter's Employment In A Religious Role, Is An Ecclesiastical Dispute**

Courts are unanimous in holding that, where a religious organization is an employer, employment disputes with certain employees, by their very nature, present ecclesiastical issues. Thus, an ecclesiastical issue is always present in a dispute involving the organization and one of its ministers concerning the adequacy of its grounds to terminate his employment. In such circumstances,

---

[2] Petitioner contended in the trial court that O'Connor Hospital is "secular" because it is incorporated as a not-for-profit *public benefit* corporation, rather than as a not-for-profit *religious* corporation. The relevant consideration here is that it is "*not-for-profit.*" *Presiding Bishop v. Amos*, 107 S.Ct. at 2872-73 and n.4.

the courts have unequivocally applied the principles established in *Serbian Orthodox Diocese* to preclude *any* judicial review. *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 277 (1986); *Kaufmann v. Sheehan*, 707 F.2d 355 (8th Cir. 1983); *Knuth v. Lutheran Church Missouri Synod*, 643 F.Supp. 444 (D.Kan. 1986); *Putman v. Vath*, 340 S.2d 26 (Ala. 1976). *Cf., King's Garden, Inc. v. F.C.C.*, 498 F.2d 51, 56 (D.C.Cir. 1974), *cert. denied*, 419 U.S. 996 (1974); *Hafner v. Lutheran Church-Missouri Synod*, 616 F.Supp. 735, 738-39 (D.C.Ind. 1985).[3]

Also in accord with this Court's reasoning in *Serbian Orthodox Diocese* is a series of decisions arising under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), in which courts have declined, on First Amendment grounds, to exercise jurisdiction over disputes involving employment relationships of ministers and others integral to the mission of the religious organization. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972); *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 3333 (1986); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *Maguire v. Marquette University*, 627 F.Supp. 1499 (E.D.Wis. 1986), *aff'd*, 814 F.2d 1213 (7th Cir. 1987).[4]

---

[3] Both *Kaufmann v. Sheehan*, 707 F.2d 355, and *Putman v. Vath*, 340 S.2d 26, concerned employment disputes involving Roman Catholic priests. *Cf., Granfield v. Catholic University of America*, 530 F.2d 1035 (D.C.Cir. 1976), *cert. denied*, 429 U.S. 821 (1976).

[4] Petitioner cites supposed conflict with two federal appellate and district court decisions arising in the context of Title VII claims of sex discrimination. *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *Dolter v. Wahlert High School*, 483 F.Supp. 266 (N.D. Iowa 1980). Both of these decisions are easily distinguished on the facts. Both involved employees who had no religious duties, and, as the courts noted, religious issues were not present. Had these cases involved church-minister relationships, the courts would have been without jurisdiction. *McClure v. Salvation Army*, 460 F.2d 553.

Thus, in every decision in which courts have been called upon to resolve a dispute between a religious organization and a minister serving in a religious role, they have declined to exercise jurisdiction, reasoning that employment disputes affecting members of the clergy are *per se* religious in nature, and the civil courts may not permissibly interfere. This must be so, because once the courts assume the right to adjudicate the validity of a church's reasons for terminating one of its ministers, it also has assumed the right to tell that church *who* should be its ministers and, therefore, *what* that church should believe in. *See, Presiding Bishop*, 107 S.Ct. at 2871-72; *Serbian Orthodox Diocese*, 426 U.S. at 714.

### C. The Neutral Principles Of Law Doctrine Is Not Applicable To Employment Disputes Involving Members Of The Clergy Serving In Religious Roles

Petitioner's principal contention is that the trial court should be directed to apply neutral principles of law to determine whether, in fact, "religious reasons" played a role in his termination. In effect, petitioner seeks to significantly expand the neutral principles doctrine beyond the limited circumstances delineated in *Jones v. Wolf*, 443 U.S. 595. In that decision, this Court permitted application of "well-established concepts of trust and property law" to resolve a dispute between a local congregation and its general church over ownership of church property, providing this could be accomplished without resolving an underlying ecclesiastical controversy. *Id.*, at 603-604. Thus, in a very important sense, *Jones v. Wolf* is not truly an exception to the strict rule of deference in ecclesiastical disputes recognized in *Watson v. Jones*, and reinforced in *Serbian Orthodox Diocese*. All that *Jones v. Wolf* did was to clarify that not all disputes involving religious organizations are necessarily ecclesiastical disputes. This Court did not suggest, nor has any court ever suggested, that the First Amendment permits a court to use "neutral principles" to resolve an ecclesiastical dispute.

Thus, petitioner's argument only makes sense if he is asserting that the dispute over his termination is a "civil or property" dispute that can be resolved by neutral principles of state law.

Application of such principles would, he argues, permit the court to determine, objectively, whether the Hospital had sufficient "cause" to terminate his employment. This argument would only have arguable merit if petitioner had been serving in a *secular* position at the Hospital without religious responsibility. However, as noted in the discussion above, courts have concluded that church-minister employment disputes are, *ipso facto*, ecclesiastical disputes which *cannot* be resolved by application of neutral principles. *See, Hutchison v. Thomas*, 798 F.2d at 396, wherein the court expressly refused to apply "neutral principles" of law to a dispute between a minister and his church. *Cf., N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974).

Petitioner places heavy, but misplaced, reliance on this Court's decision in *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986), for the proposition that a court can apply neutral principles of law in employment disputes which raise First Amendment issues to determine whether the employment decision was "faith-based." *See*, Petition, p. 5. For several reasons, that decision is not helpful to petitioner. First, the language in *Dayton Christian Schools* he relies on is mere dictum, as this Court deferred consideration of the constitutional issue, holding only that abstention was appropriate under the principles of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. Moreover, *Dayton Christian Schools* did not involve an employment relationship between a religious organization and one of its ministers serving in a religious role.[5] As to such relationships, the courts are unanimous that such disputes, by their very nature, will always present ecclesiastical issues. Thus, there is no need for even a limited inquiry whether the decision was religious in nature.

---

[5] In order to give *Dayton Christian Schools* the construction advanced by petitioner, petitioner has to argue that this Court, by an oblique comment, not central to its holding, implicitly overruled a clearly delineated doctrine developed in *Serbian Orthodox Diocese* and *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490.

### 1. A Limited Number Of Courts Have Permitted Review Of The Procedural Validity Of The Removal Of A Pastor Of A Congregational Church

Although it is settled law that the courts are constitutionally prohibited from reviewing the substance of intra-church disputes, courts do have a limited jurisdiction to determine a *procedural* issue—namely, whether the church has, in fact, acted. In cases involving hierarchical churches, the inquiry is relatively simple, as such churches, by their structure, have procedures by which aggrieved parties may seek review by a higher authority within the church. In accordance with *Serbian Orthodox Diocese,* the court must defer to the decision of the church's highest tribunal to which a dispute has been taken. *Watson v. Jones*, 80 U.S. at 727, *Serbian Orthodox Diocese*, 426 U.S. at 724-25. The Catholic Church is such a hierarchical religion, and has an elaborate system by which aggrieved parties in intra-church disputes can seek redress.[6] It is undisputed that petitioner chose not to pursue such procedures and thus, the decision to terminate became the decision "by the highest church judicatory to which the matter has been carried," which must be accepted by civil courts as binding. *Watson v. Jones*, 80 U.S. at 727.

By contrast, congregational churches present the courts with a more complex problem—deciding whether the church has acted, and what is the highest church authority. *Watson v. Jones*, 80 U.S. at 722-723. However, the courts may only resolve this problem if doing so can be accomplished, and if the appropriate

---

[6] The trial court was presented with the affidavit of the Reverend John Folmer, an expert in the canonical law of the Church: "An Associate Pastor, or an Associate Chaplain [the position occupied by Father Cleu], has internal church remedies available to him if he objects to his pastor's or chaplain's decision to remove him. Either may, under Canon Law, challenge the removal with the Bishop, and then appeal to the Sacred Congregation for the Clergy in Rome. The Sacred Congregation for the Clergy has authority to confirm, modify or reject the Diocesan Bishop's action, including reinstatement of an Associate Pastor or Chaplain in his position." *See*, Declaration of Reverend John Folmer, ¶ 19, Appendix to Petition for Writ of Prohibition, p. 68. Petitioner did not dispute these essential facts.

religious body can be determined, "without extensive inquiry into religious polity." *Maryland & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369-370 (1970). In making that inquiry, some courts have spoken of applying "neutral principles" as a means of determining whether a congregational church has acted in accordance with its own rules and bylaws. Petitioner argues as though this *procedural* inquiry to determine whether the church's "authority" has acted is a substantive judicial review of the *reasons* for the termination of a pastor. However, it cannot be emphasized too strongly that no court, even courts construing congregational church cases, has ever held that it has the right to review the *reasons* for the termination of a minister.

It is in this light that three decisions cited by petitioner are easily distinguished. *Providence Baptist Church v. Superior Court*, 40 Cal.2d 55, 251 P.2d 10 (Cal. 1952), involved a "congregational" church and, in that case, the court examined whether "the rules of the society [had] been followed." The court specifically noted that it did not have jurisdiction to resolve issues of substance regarding the minister's employment since that would require resolution of ecclesiastical issues.[7] *Id.*, 40 Cal.2d at p. 63. *Evangelical Lutheran St. Paul's Congregation v. Hass*, 187 N.W. 677 (Wis. 1922) as well involved a "congregational" church, but this case is of doubtful value since it preceded this court's broad ruling in *Serbian Orthodox Diocese* and should be viewed with circumspection. Finally, *Waters v. Hargest*, 593 S.W.2d 364 (Tex.Civ.App. 1979), also addressed a congregational church. In accepting jurisdiction, the court noted that the church in question had " . . . no hierarchical constitution or regulations governing the right of the church to contract, and no church adjudicatories having jurisdiction to determine questions concerning such contract." *Id.*, 593 S.W.2d at pp. 365-66. In not one of the cases cited by petitioner in which a court exercised jurisdiction did the court

---

[7] Even if *Providence Baptist Church* could be said to support Father Cleu's position, the validity of the holding in *Providence* has been questioned by a subsequent California appellate court decision, *Wilson v. Hinkle*, 67 Cal.App.3d 506, 510-12 (1977), in light of this Court's decisions in *Presbyterian Church v. Hull Church*, 393 U.S. 440 and *Serbian Orthodox Diocese*, 426 U.S. 696.

consider any issue bearing remotely on the reasons, or sufficiency of those reasons, for the removal of a pastor.[8]

### 2. Decisions Of Courts Cited By Petitioner Involving Hierarchical Churches Are Distinguishable On Their Facts

Petitioner contends that two decisions involving Catholic religious are in conflict with the decision of the Court of Appeal below. He relies principally on *Reardon v. LeMoyne*, 454 A.2d 428 (N.H. 1982). However, the plaintiffs in *Reardon* did not occupy religious positions. On the contrary, although they were nuns and thus members of the Catholic Church, they were employed as teachers, and in one case, as a principal at a school. Indeed, the court cautioned that to the extent the defendants alleged secular grounds for discharge, a court could rule on the sufficiency of such reasons, but grounds "found to involve doctrinal judgments . . . are clearly beyond the judicial sphere of authority." *Id.*, 454 A.2d at p. 433. By contrast, petitioner is a priest employed as a priest to carry out undisputed religious duties, and thus occupied a position which was indisputably religious in nature, and his discharge *ipso facto* touched upon religious issues.[9]

---

[8] Petitioner also cites the reported decision of a New York court in *Kupperman v. Congregation Nusach Sfard of The Bronx*, 240 N.Y.S.2d 315 (1963), for the proposition that a civil court can entertain a suit for violation of procedural guaranties of a contract between a rabbi and a religious corporation. However, in *Kupperman*, neither party to that dispute asserted a defense based on the First Amendment. In any event, that decision was soundly criticized by another New York court in *Zimbler v. Felber*, 445 N.Y.S.2d 366 (1981).

[9] The Court of Appeal below relied on a recent decision of the Montana Supreme Court in *Miller v. Catholic Diocese of Great Falls-Billings*, 728 P.2d 794 (Mont. 1986), in which that court upheld, on free exercise grounds, a trial court determination that it had no jurisdiction in a wrongful termination lawsuit brought by a lay teacher discharged by a parochial school for inadequate discipline of students. Although the *Miller* decision is facially irreconcilable with *Reardon*, there is an important distinction. In *Miller*, the basis for the teachers dismissal was allegedly intertwined the "religious principles." In *Reardon*, there is no

Petitioner also cites conflict with the decision of the District of Columbia Circuit in *Granfield v. Catholic University of America*, 530 F.2d 1035 (D.C.Cir. 1976), *cert. denied*, 429 U.S. 821 (1976). This reliance also is misplaced. Although *Granfield* involved the employment of two Roman Catholic priests, they were employed as law professors—not as chaplains. Indeed, the decision in *Granfield* strongly supports respondent Hospital's position. The court in *Granfield* concluded that the dispute between the priests and the church-related institution which employed them, over their claim to parity of salaries with lay faculty members, was one which "must be resolved within the confines of the religious body involved." *Id.*, 530 F.2d at 1047.[10]

## II

## THE PETITION SHOULD BE DENIED AS PETITIONER'S REMAINING CONSTITUTIONAL ARGUMENTS ARE WITHOUT MERIT

### A. Petitioner Did Not Preserve His Remaining Constitutional Arguments By His Failure To Raise Them As Grounds For Review Before The California Supreme Court

The final arguments presented in the Petition are somewhat confused (*see* Petition, pp. 10-13). These arguments relate to petitioner's contentions that the Court of Appeal decision contravenes the Establishment Clause of the First Amendment, the Equal Protection Clause of the Fourteenth, and the Seventh Amendment right to a jury trial of disputed factual issues.

Although these contentions were raised before the Court of Appeal in at least cursory fashion, petitioner did not present them in his Petition for Review filed with the California Supreme Court on November 19, 1987. Thus, the highest court of the State of California was not presented an opportunity to review these asserted grounds for reversal of the Court of Appeal, and they

---

mention of the reasons alleged for the dismissal of the affected employees.

[10] It should be noted that *Reardon* and *Granfield* represent the only cases cited by petitioner involving churches with hierarchical polity.

should therefore be deemed abandoned as not properly presented. *See, Webb v. Webb*, 451 U.S. 493, 496-97 (1981).

### B. Judicial Abstention From Disputes Of This Nature Does Not Offend The Establishment Clause

Even if the remaining constitutional arguments are properly before this Court, only petitioner's Establishment Clause argument has been adequately presented at any stage of these proceedings. The principal thrust, apparently, is that deference to religious authority, or judicial abstention from disputes of this nature, is respecting an establishment of religion. However, the reasoning of this Court's decision in *Presiding Bishop*, 105 S.Ct. at 2869-70, and of the Fourth Circuit in *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d at 1169-71, in which similar arguments were advanced in employment disputes, compels rejection of this argument. Indeed, abstention from the dispute between petitioner and the religious organization which employed him in a religious role is clearly more compelling than in the *Presiding Bishop* and *Rayburn* cases. The freedom to select the Catholic priest serving in pastoral care is critical to the Daughters' ability to define and carry out their religious mission, and, for a civil court to even attempt to resolve this dispute would require that it examine the subjective determinations of Catholic religious, and substitute its own judgment, as to the appropriateness of petitioner's performance as a Catholic chaplain.

In any event, petitioner's Establishment Clause argument springs from a gross exaggeration of the impact of the decision below. The Court of Appeal did not hold, nor has it been contended, that the Hospital, as a religious organization, has an unrestricted right to abrogate its contracts, or that it is free to treat its employees with impunity. The Court of Appeal decision simply recognized that *petitioner* occupied a key role in the fulfillment of the religious mission of the sponsoring religious order. The principle at stake here, and recognized by the Court of Appeal, is that a civil court cannot control the selection, employment, and removal of an employee serving in a religious, ministe-

rial position. In this sense, the decision applies to a very limited class of employee.[11]

## CONCLUSION

The sensitive nature of the church-minister relationship is such that disputes arising out of a minister's termination, by definition, are ecclesiastical in nature. Since petitioner is a priest who occupied a position that could only be held by a priest, and since his employer is indisputably a part of the same church to which he belonged, any dispute over his termination inevitably raises ecclesiastical issues. Therefore, according to the overwhelming weight of authority, this dispute cannot be resolved by the civil courts without violating the Free Exercise Clause of the First Amendment. The Court of Appeal decision is entirely consistent with those principles, and no purpose is served by further review of this matter.

Accordingly, the Hospital respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

WEISSBURG AND ARONSON, INC.
GREGORY W. MCCLUNE
STEPHEN W. PARRISH
555 California Street
Suite 2400
San Francisco, CA 94104
(415) 434-4484
*Attorneys for Respondent*
*O'Connor Hospital*

---

[11] Petitioner also argues that the decision of the Court of Appeal will negatively impact other employees, and, unless clarified, "will inspire similar [First Amendment] defenses across the nation." However, because the decision has been decertified for publication by the California Supreme Court, it will not appear in the official reports of decisions, and may not be cited as legal precedent before the courts of the State of California, and, presumably, in other jurisdictions.

**APPENDIX**

6th District, No. H003221

S003187

In the Supreme Court of the
State of California

In Bank

---

O'Connor Hospital, Petitioner,

v.

Superior Court of the County of
Santa Clara, Respondent;
Cleu, Real Party in Interest.

---

[Filed Dec. 23, 1987]

---

Petition for review of Real Party in Interest DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed October 14, 1987, which appears at 195 Cal.App.3d 546. (Cal. Const., Art. VI, section 14); Rule 976, Cal. Rules of Court.

LUCAS
Chief Justice

No. 6th H003221, S003187

In the Supreme Court of the
State of California

In Bank

---

O'Connor Hospital, Petitioner

v.

Superior Court of the County of
Santa Clara, Respondent;
Cleu, Real Party in Interest

---

[Filed Dec. 30, 1987]

---

Due to clerical error, the order filed herein on December 23, 1987, is hereby amended to include the following: Panelli, J., did not participate.

/s/ LUCAS
Chief Justice

Court of Appeal of the State of California
Sixth Appellate District

No. H003221
Superior Court No. 609434

O'Connor Hospital,
Petitioner,

vs.

Santa Clara County Superior Court,
Respondent;

Paul E. Cleu,
Real Party in Interest.

---

PEREMPTORY WRIT OF PROHIBITION
[Filed Feb. 4, 1988]

The People of the State of California to the Superior Court of the State of California, in and for the County of Santa Clara, Greetings:

The petition for a writ of prohibition on file herein having been considered, and this court having ordered that a peremptory writ of prohibition issue,

WE DO COMMAND YOU to take no further action other than dismissal.

Witness the Honorable Nat A. Agliano, Presiding Justice of the Court of Appeal of the State of California, Sixth Appellate District.

Attest my hand and the Seal of this Court this Jan. 7, 1988.

RICHARD J. EYMAN, Clerk

By C. POCHOP
Deputy Clerk